PROCEEDINGS AND ORDERS DATE: 11/87

CASE NOS 87-1-05505 CFM
SHORT TITLE Devier, Darrell G. DOCKETED: Sep 16 1987
VERSUS Kemp, Warden

| Date | Proceedings and Orders |
|---|---|
| Sep 16 1987 | Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. |
| Oct 17 1987 | Brief of respondent Ralph Kemp in opposition filed. |
| Oct 22 1987 | DISTRIBUTED. November 6, 1987 |
| Nov 9 1987 | The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall with whom Justice Brennan joins. (Detached opinion.) |
| | ********** |

EDITOR'S NOTE

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87-5505 ORIGINAL

No. 87-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987



DARRELL GENE DEVIER,

Petitioner,

-v-

RALPH KEMP, Warden,
Georgia Diagnostic and
Classification Center,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

September 16, 1987

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COUNSEL FOR PETITIONER

## QUESTION PRESENTED

I.

Whether the admission of unadjudicated criminal conduct evidence at the capital sentencing proceeding, in the absence of any cautionary or burden of proof instruction, violated the Eighth and Fourteenth Amendments?



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TO THE SUPREME COURT OF GEORGIA

Petitioner respectfully requests that this court issue a Writ of Certiorari to review the judgment of the Superior Court of Butts County, State of Georgia.

OPINIONS BELOW

The order of the Supreme Court of Georgia denying Petitioner's Application for A Certificate of Probable Cause to Appeal from the denial by the Superior Court of Butts County of his habeas corpus petition is not reported. See, Appendix 1. The opinion of the Superior Court of Butts County is attached as Appendix 2.

JURISDICTION

The order of the Supreme Court of Georgia was entered on June 18, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the Constitution of the United States provides:

> Excessive bail shall not be required, not excessive fines imposed, nor cruel and unusual punishment inflicted.

The Fourteenth Amendment to the Constitution of the United States provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileged or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

O.C.G.A. §17-10-30 provides in pertinent part:

> (b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

## STATEMENT OF THE CASE

Petitioner was tried in 1983 in the Superior Court of Floyd County, Georgia, and convicted of the rape and murder of Mary Frances Stoner. He received a sentence of death; however both original verdicts were reversed by the Georgia Supreme Court in 1983, due to the unconstitutional make-up of the Floyd County grand jury. Petitioner was retried before a jury in the Superior Court of Floyd County, Georgia, and was again convicted and sentenced to death.

At the sentencing phase of Petitioner's trial, the State introduced the testimony of Linda Gail Elrod. Ms. Elrod testified that Petitioner had sexually assaulted her. Petitioner was never tried for Ms. Elrod's alleged assault. The trial court did not instruct the jury prior to its deliberations that it could consider this evidence only if all members found that the assault had in fact occurred, and were so convinced beyond a reasonable doubt.



On direct appeal, the Georgia Supreme Court found no error in the admission into evidence of Ms. Elrod's testimony. In the underlying state post-conviction proceeding, Mr. Devier asked the Court to reexamine this claim. The Superior Court of Butts County held that the issue was res judicata. The Georgia Supreme Court refused to grant discretionary review.

## REASONS FOR GRANTING CERTIORARI

The Court should grant certiorari to decide under what circumstances the state may permissibly introduce at a capital sentencing hearing evidence that a defendant has committed other crimes which have not previously resulted in a conviction. Because the introduction of such evidence injects highly unreliable and prejudicial circumstances for the jury's consideration, if such evidence is admissible at all, it must be accompanied by proper procedural safeguards. Because all such safeguards were absent here, this case presents a particularly appropriate vehicle for plenary consideration of this issue.

### I. THE INTRODUCTION OF UNADJUDICATED CRIMINAL CONDUCT EVIDENCE INTO THE CAPITAL SENTENCING PROCEEDING IN THIS CASE IN THE ABSENCE OF ANY SAFEGUARDS, RENDERS THE CAPITAL SENTENCE UNRELIABLE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION

In this case, the trial court allowed the jury at the sentencing phase to hear the testimony of Linda Gail Elrod. Ms. Elrod, a minor, testified that she had been sexually-assaulted by Petitioner on June 2, 1979. This alleged assault of Ms. Elrod occurred approximately six (6) months prior to the crime for which Petitioner has been tried and convicted of capital murder.

Petitioner was never tried for the alleged assault of Ms. Elrod; in fact, the indictment based upon Ms. Elrod's accusation did not issue until eight months after the alleged event - on February 2, 1980 - three weeks after Petitioner had been indicted for the offense underlying this petition for writ of certiorari. The delay in the indictment and arrest of Petitioner based on Ms. Elrod's charges was not a result of an inability to

locate Petitioner. Petitioner's whereabouts were known to Ms. Elrod, and the state, during the eight months preceding his indictment. (Tr. 1587). The eventual indictment of Petitioner was pretextual, done only for the purpose of facilitating the investigation of the crime for which Petitioner was tried and convicted.

The admission into evidence of Ms. Elrod's testimony violated his rights as guaranteed by the Eighth and Fourteenth Amendments to the Constitution of the United States. Petitioner acknowledges that evidence of his character can legitimately be introduced at the sentencing phase of his trial. In fact, consideration of character evidence in the sentencing phase is necessary so that the fact-finder can exercise its discretion intelligently and rationally, and meet the constitutionally mandated requirement of individualized sentencing embodied implicitly in the Eighth Amendment. See, Lockett v. Ohio, 438 U.S. 586 (1978). But the desirability in seeing that the jury having a complete portrait of a defendant's character has always been tempered by the Eighth Amendment requirement that capital sentencing determinations be based upon reliable information. As this Court has stated:

> The penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100 year prison term differs from one of only a year or two. Because of this qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

Over the years this Court has, in a variety of contexts, found the admission of certain types of evidence in the sentencing phase of a trial to be unconstitutional. See, Townsend v. Burke, 334 U.S. 736 (1948)(violation of due process to be sentenced on the basis of "materially untrue" information regarding prior criminal record, where defendant lacked counsel); Mempa v. Rhay, 387 U.S. 128 (1967)(right to counsel at sentencing to ensure sentence not based upon misleading court records); United States v. Tucker, 404 U.S. 443 (1972)(sentencing judge may



not consider previous convictions of the defendant that were constitutionally invalid because defendant not represented by counsel during trial); Gardner v. Florida, 430 U.S. 349 (1977)(judge's partial reliance upon undisclosed presentence investigation report violated defendant's due process rights by denying him opportunity to challenge the basis upon which the judge invoked the death penalty).

The issue of whether the Eighth Amendment prohibits the admission at the sentencing phase of a capital trial of unadjudicated prior bad acts as aggravating evidence has not been directly addressed by this Court. The Court should grant certiorari and hold that such evidence is inadmissible in such proceedings. The introduction of such evidence injects unwarranted speculation into the delicate capital sentencing balance. It places before the jury the question of whether a defendant violated another criminal statute at another time, for which the defendant is presumed innocent. Often, the evidence is introduced in the absence of any instruction as to the elements of such offense or of what standard of proof the State must meet for such evidence to be competent for consideration. In short, its introduction requires the defendant to defend himself against other criminal acts during the trial for his life, and requires the jury to make difficult judgments of great consequence in the absence of proper guidance. To allow the jury to consider the highly prejudicial and inflammatory evidence presented by Ms. Elrod, testimony of no relevance whatsoever to the crime for which Petitioner was convicted, and of dubious probative value generally, is contrary to this Court's articulated requirement of a heightened "need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. at 305.

Yet even if the Court were to hold that unadjudicated crime evidence is sometimes admissible, such evidence is never admissible in the absence of a standard of proof instruction. In Georgia, the state courts have announced that no such rule is constitutionally required. Devier v. State, 253 Ga. 604, 323

S.E.2d 150 (1984); Ross v. State, 254 Ga. 22, 326 S.E.2d 194 (1985). On the other hand, other state courts have declared that an instruction authorizing the consideration of such evidence only if the jury has found that the defendant committed the other crime beyond a reasonable doubt is constitutionally required. People v. Polk, 406 P.2d 641 (Cal. 1965). This is a sensible rule wholly consistent with the Courts' post-Gregg capital jurisprudence. Georgia's explicit refusal to instruct the jury on how and under what circumstances it can legitimately consider unadjudicated crime evidence diminishes, rather than promotes, the reliability of the sentencing determination.

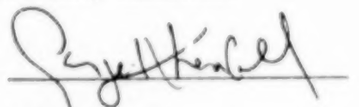
In summary, the admission into evidence of Linda Gail Elrod's testimony at the sentencing phase of the trial denied Petitioner a sentencing process that safeguarded and facilitated the responsible and reliable exercise of sentencing discretion, thereby violating his rights as guaranteed by the Eighth and Fourteenth Amendments to the Constitution of the United States. Because Petitioner's sentence of death rests upon a fundamentally faulty and unreliable factual basis, and because this question is an important one to the proper administration of criminal justice in this country, issuance of the writ is called for.



## CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

By: 

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

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DARRELL GENE DEVIER,

Petitioner,

-v-

RALPH KEMP, Warden,
Georgia Diagnostic and
Classification Center,

Respondent.

---

CERTIFICATE OF SERVICE

---

I hereby certify that I have served a copy of the foregoing Petition for Writ of Certiorari upon Respondent by depositing copies of same in the United States Mail, with proper first class postage affixed thereto, addressed as follows:

Dennis R. Dunn, Esq.
Assistant Attorney General
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334

This the 16TH day of September, 1987.

ATTORNEY FOR PETITIONER

No. 87-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

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DARRELL GENE DEVIER,

Petitioner,

-v-

RALPH KEMP, Warden,
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Respondent.

---

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

---

APPENDIX

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September 16, 1987

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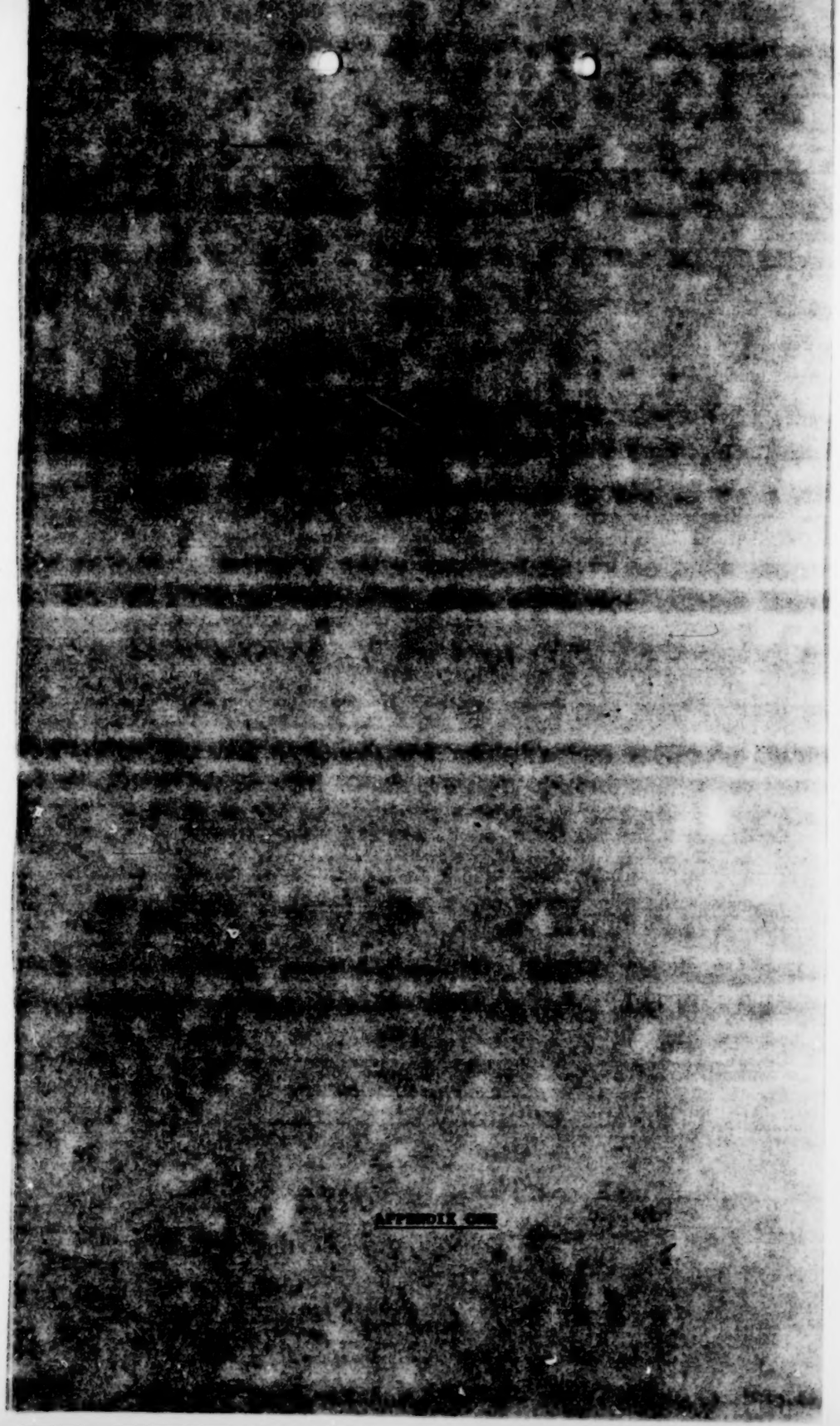

Application No. 4018

1

**SUPREME COURT OF GEORGIA**

ATLANTA June 18, 1987

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

DARRELL GENE DEVIER V. RALPH KEMP, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied.

**SUPREME COURT OF THE STATE OF GEORGIA,**

CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Delene B. Williams Clerk.

APPENDIX TWO

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

| | | |
|---|---|---|
| DARRELL GENE DEVIER,<br>Petitioner, | * | CIVIL ACTION NO. |
| VS. | * | 85-V-242 |
| RALPH KEMP, Warden,<br>GEORGIA DIAGNOSTIC AND<br>CLASSIFICATION CENTER,<br>Respondent | * | HABEAS CORPUS |

ORDER

Petitioner comes before this Court for the first time on a Petition for Writ of Habeas Corpus challenging the constitutionality of his restraint and the imposition of the death penalty by the Superior Court of Floyd County. Petitioner was convicted of murder and rape and was sentenced to death. The Supreme Court of Georgia affirmed both the conviction and sentence on direct appeal. Devier v. State, 253 Ga. 604 (1984). The United States Supreme Court denied certiorari. Devier v. State, _____U.S._____, 105 S.Ct. 1877, 85 L.Ed.2d 169 (1985).

Daniel P. Chapman
Clerk, Butts Superior Court

The record in this case consists of the transcript of the proceedings before this Court on February 11, 1986; the various affidavits and pleadings filed in this proceeding; and the record and transcript of Petitioner's trial in Floyd County Superior Court.

51-53

In paragraphs 51-53, Petitioner alleges that his trial coun-

sel did not render reasonably effective assistance of counsel during both the guilt-innocence and penalty phases of Petitioner's trial, in violation of rights guaranteed by the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, and in violation of rights guaranteed by Sections 2-101, 2-102, 2-111, 2-114, and 2-117 of the Constitution of the State of Georgia of 1983.

FINDINGS OF FACT

Petitioner was represented by attorneys Scott Callan and Albert F. Burkhalter, Jr., both of Rome, Georgia, who were appointed by the trial court on April 19, 1983. Attorney Callan had considerable criminal trial experience, including one case where the death penalty was sought. (Habeas Transcript 20-21). Attorney Burkhalter was appointed to assist in the preparation and defense of Petitioner's case and also had considerable criminal trial experience as he had tried several felony cases prior to Petitioner's trial and had previously assisted in a death penalty case. (H.T. 99-100).

Both attorneys testified that they did not have a lot to work with as there were no alibi witnesses and the two previous trials had received extensive publicity. (H.T. 37-39, 116). Their trial strategy was to try a low-key approach, attack the State's case, and ensure Petitioner a fair trial by presenting the case as fairly and vigorously as they possibly could. (Id.). Attorney Callan testified before this Court that the Petitioner was able to help in their preparation of the case for trial by



giving them a good deal of information about all of the case, including his whereabouts, and what he did subsequent to his arrest. (H.T. 54).

In the First Proceedings under the Unified Appeal Procedure, the Prosecutor informed the Petitioner, his trial counsel, and the trial court that they expected to utilize each and every aggravating circumstance that was used in the previous trial of Petitioner. (First Proceeding, May 31, 1983, p. 29). The witness, Linda Gail Elrod, testified in the sentencing phase of Petitioner's first trial and trial counsel reviewed that transcript. (H.T. 40, 105-06).

The attorneys worked together but divided the workload as to some of the pretrial motions, such as the change of venue motion and the motion based on Dunaway v. New York, 442 U.S. 200 (1979). (H.T. 102-03). Attorney Burkhalter testified that the change of venue issue was the primary legal issue they had because they felt there was a lot of pretrial publicity about the case. (H.T. 103). However, there was not as much community interest in this trial as there was in the first one. (H.T. 63). Both attorneys reviewed the prior trial transcript and talked at length with counsel who previously represented Petitioner and with the district attorney who prosecuted the case. (H.T. 105-06, 116, 134-35). Attorney Burkhalter testified that he spent several days preparing for the cross-examination of the State Crime Lab expert and that they had advance knowledge from the previous trial about the evidence the State would try to introduce, including the tes-

timony of Linda Gail Elrod. (H.T. 40, 105-06).

Attorney Burkhalter testified that he did not know that they would have tried the case any differently had the change of venue motion been granted but that, as to the jury selection and voir dire of the potential jurors, they "...certainly had to work on it a lot more because we were dealing with people(,) most of whom had heard of the case, many of whom had known the outcome of the previous trial and then, some of who had made up their mind about what they--how they felt about the case." (H.T. 103-04). Both attorneys testified that they tried to rank the potential jurors so as to get the ones whose minds were open to persuasion. (H.T. 32-33). Attorney Callan testified that their failure to use all their peremptory strikes was specifically due to their efforts to obtain Petitioner the best jury panel from the available qualified jurors. (H.T. 34).

During the review of transcripts and news articles, and in interviewing persons who had attended one of Petitioner's previous trials, counsel decided with Petitioner's concurrence that Petitioner would not testify because he projected himself in a "fairly sneering arrogant manner..." (H.T. 37-38).

In preparation for the sentencing phase of Petitioner's trial, the attorneys talked extensively with their client, his mother and other members of his family about anyone that they knew to bring forward to testify on Petitioner's behal . (H.T. 107). Attorney Burkhalter testified that he dec[illegible] that he would tailor his closing argument towards a mercy plea. (Id.).



Attorney Callan testified that they wanted the jury to see a human being, with some relatives that loved him, and show that the defendant was someone with redeeming value to him. (H.T. 81).

Larry Salmon, who was formerly the district attorney for the Rome Judicial Circuit, testified that he recalled that there was a polygraph examination administered to Petitioner and that this was reported to him as being inconclusive. (H.T. 137).

The Court has reviewed the newspaper articles submitted by Petitioner's counsel in support of their allegations in paragraph 53(h) and notes that several of the articles submitted did not refer to Petitioner, his trial, or the crimes of which he was convicted.

In addition to the above-mentioned motions, trial counsel filed a motion for individual and sequestered voir dire, a motion for funds to hire investigators and expert witnesses, a Brady motion, a motion for discovery, and at least two separate motions to suppress. (Record, Index thereto).

CONCLUSIONS OF LAW

Petitioner alleges that his trial attorneys did not render reasonably effective assistance of counsel during both the guilt-innocence phase and the penalty phase of Petitioner's trial. As there are several separate allegations, this Court will address them as they logically interrelate.

(a-b)

Petitioner alleges that trial counsel failed to adequately

present a case for mitigation of punishment, in that, they failed to investigate, discover and present any potential evidence for mitigation of punishment. In addition, Petitioner alleges that trial counsel failed to perform adequate research regarding state and federal restrictions on sentencing in death penalty cases.

At the sentencing phase, Petitioner's trial counsel presented mitigating evidence in the form of witnesses' testimony. (T.T. 1591-1599). Petitioner has failed to show that there was any other mitigating evidence of which his attorneys were aware or that the same was of such a magnitude to have changed the outcome of his sentencing. Trial counsel testified that they did talk to Petitioner's family and asked them if there were any witnesses of this nature. Counsel further testified that they explained to Petitioner and his family the purpose of the sentencing phase -- that they knew it would be a question of life or death.

Petitioner has failed to carry his burden of proof as to this allegation of ineffectiveness of counsel.

(c-d)

Petitioner alleges that trial counsel failed to object to the Prosecutor's improper closing argument and failed to object to unconstitutional jury instructions at the sentencing phase of Petitioner's trial.

The Prosecutor's argument was based upon evidence presented at trial and was a legitimate consideration for the jury. Therefore, trial counsel's failure to object to this argument cannot



be considered constitutionally ineffective. Conner v. State, 251 Ga. 113 (1973); see also, Darden v. Wainwright, 477 U.S. ____, 91 L.Ed.2d 144 (1986). Likewise, these jury instructions have been held proper, and trial counsel will not be found ineffective for having failed to object thereto. Devier, supra, at 618 (8).

(e)

Petitioner alleges that trial counsel failed to conduct an independent investigation of the facts and circumstances of the offense. Petitioner argues that had trial counsel investigated adequately, there would have been a reasonable probability of obtaining a different result. As evidence in support of this, Petitioner offers affidavits from relatives and members of the community. However, Petitioner has not shown that his trial counsel were aware of these witnesses. As shown above, trial counsel attempted to pursue this line of mitigating evidence.

Trial counsel extensively reviewed the transcript of one of the previous trials. This gave them the advantage of knowing exactly what defense strategies failed previously. Specifically, in reviewing previous transcripts and talking to persons who had attended previous trials, counsel decided with Petitioner's concurrence that he would not testify because he was projected by the newspapers and had projected himself in a "fairly sneering arrogant manner..."

Considering the facts available to trial counsel and all of the efforts put forth in this regard, counsel's performance fell within that range of competence expected of competent criminal

trial lawyers.

(f)

Petitioner alleges that trial counsel failed to investigate and present psychological evidence, including Petitioner's competency, criminal responsibility and general mental status. Petitioner also alleges that the attorneys failed to make an appropriate request for the funds necessary to pay a psychiatrist. Specifically, Petitioner argues that trial counsel allowed the trial court's denial of their motion for funds for a psychiatrist dissuade them from a potential avenue of mitigating evidence. (See Petitioner's brief, page 14).

However, Petitioner has not shown that such evidence existed, that trial counsel overlooked it, or that there were circumstances to include in the motion for funds that counsel failed to argue. Accordingly, Petitioner has not shown that trial counsel's performance in this regard fell short of that expected of competent criminal trial lawyers.

(g)

Petitioner alleges that trial counsel failed to request a jury instruction on the voluntariness of Petitioner's confession. In pretrial motions, counsel attacked the validity of this confession, having filed at least two separate motions to suppress, one of which was based on Dunaway v. New York, 442 U.S. 200 (1979). (R. 27, 50). The trial court rejected these motions and the Supreme Court of Georgia affirmed their denial on direct appeal. Devier, supra, at 610-17 (7). Therefore, Petitioner has



not shown that trial counsel's performance in this regard was deficient.

(h)

Petitioner alleges that trial counsel failed to present substantial evidence in support of a motion for a change of venue. Trial counsel testified before this Court that one of their primary objectives prior to trial was to have venue changed. Counsel filed the necessary motion and presented extensive evidence in support thereof. Petitioner has not shown any specific relevant evidence that counsel failed to present of such a nature as to warrant a different result in the trial court's ruling on this motion. This ruling was affirmed on direct appeal. Devier, supra, at 608-09 (4). Petitioner has failed to show that trial counsel's performance in this regard was deficient. Therefore, this claim fails.

(i)

Petitioner alleges that trial counsel failed to preserve a potential Witherspoon challenge by failing to use all of his peremptory strikes. Counsel testified that they were well prepared for the voir dire of the jury, in that, they both had extensive knowledge of the area and the potential jurors. Petitioner was granted individual sequestered voir dire so that trial counsel was able to question the jurors fully regarding their attitudes on the death penalty and their knowledge about the previous trials. Finally, counsel testified as to how they ranked all the potential jurors based on voir dire prior to the

actual striking of the jury and that, in an effort to get Petitioner the best jury possible from the available qualified jurors, their jury was picked before Petitioner's strikes were exhausted. Such a specific trial strategy will not be second-guessed in review of counsel's performance. Petitioner has not shown that such strategy was clearly in error or based on false facts or unsound logic. As the Supreme Court of Georgia reviewed the voir dire of each challenged juror and found no error, trial counsel's strategic efforts fell within that range of competence expected of competent counsel in this regard. Therefore, this claim fails.

(j-k)

Petitioner alleges that trial counsel failed to perform adequate research prior to advising Petitioner to waive his challenges to both the grand jury and traverse jury arrays. Petitioner has presented no evidence or arguments in support of this claim and the same necessarily fails.

(l)

Petitioner alleges that trial counsel failed to make an appropriate request for funds to pay an investigator, psychiatrist or other experts. [See (f), above, as to the request for funds for a psychiatrist]. Trial counsel testified before this Court that this request was basically a "fishing" expedition to explore the State's case. (H.T. 89). As Petitioner has not shown that trial counsel's presentation and argument of this motion fell short of that competence demanded of counsel, Petitioner has not



carried his burden of proof.

(m)

Petitioner alleges that trial counsel failed to object to unconstitutional burden-shifting instructions respecting the malice element of malice murder. The instruction which Petitioner claims to be unconstitutional is as follows:

> Malice shall be implied where no considerable provocation appears and where all of the circumstances show an abandoned and malignant heart. (T.T. 1538).

Petitioner alleges that this instruction created a rebuttable mandatory presumption. However, the Supreme Court of Georgia has reviewed this charge and found it to be constitutional. Jones v. Francis, 252 Ga. 60, at 63-4 (7) (1984), citing Lamb v. Jernigan, 683 F.2d 1332 (12) (11th Cir. 1982).

(n)

Petitioner alleges that trial counsel failed to examine and conduct tests on the State's physical evidence. Trial counsel each reviewed the trial transcripts and then compared their notes. (H.T. 27). Trial counsel also testified that there was no evidence that the State's experts were biased or that the evidence was incorrect. (H.T. 90). Petitioner has failed to show any error.

(o)

Petitioner alleges that trial counsel failed to preserve objections to the State's improper use of non-statutory aggravating

circumstances. Petitioner alleges that the non-statutory aggravating circumstances were improper due to the State's failure to give proper and timely notice of its intent to introduce the testimony of Linda Gail Elrod as required by OCGA section 17-10-2.

Petitioner has not proven that the State failed to give such notice. Furthermore, Petitioner has not shown that such an objection would have been sustained as proper. It is clear that trial counsel were aware of the possibility of this evidence. Counsel testified before this Court that the "...Linda Elrod situation was one that concerned us from day one...We were concerned ... that that would ... build their case even stronger against Mr. Devier..." (H.T. 40).

Petitioner has failed to show that trial counsel's performance in this regard was deficient.

(p)

Petitioner alleges that trial counsel failed to present evidence regarding the unconstitutionality of a "death-qualified" jury. As "death-qualified" juries have been held to not be unconstitutional, counsel cannot be found to have been in error in this regard. Lockhart v. McCree, ____ U.S. ____, 90 L.Ed.2d 137, 106 S.Ct. 1758 (1986).

(q)

Petitioner alleges as error trial counsel's failure to present evidence on the voluntariness of Petitioner's confession. However, counsel did present evidence to the trial court by way



of the stipulated submission of a nearly 600 page transcript of the Jackson v. Denno hearing held in the earlier trial. The trial court found Petitioner's confession to be voluntary, and that ruling was affirmed on direct appeal. Devier, supra, at 610-17 (7).

Petitioner has failed to show that trial counsel's performance in this regard fell below that expected of competent criminal trial counsel.

(r)

Petitioner alleges that trial counsel's waiver of Petitioner's right to a new Jackson v. Denno hearing constituted ineffective assistance of counsel. Devier, supra, at 610 (7). Petitioner has not shown that a new Jackson v. Denno hearing would have made a difference, and counsel was not ineffective for failing to pursue one.

(s)

Petitioner alleges that trial counsel's failure to object to the admission of numerous photographs of the victim constituted ineffective assistance of counsel. Petitioner fails to show that a valid objection existed as to any of the photographs. Further, Petitioner has failed to show any prejudice that resulted from counsel's failure to object to any photographs. As Petitioner has failed to carry his necessary burden of proof, counsel cannot be found ineffective for having failed to object to these photographs. See Paragraphs 54-55, infra.

(t)

Petitioner alleges that trial counsel's failure to proffer the results of a polygraph examination during the penalty phase constituted ineffective assistance of counsel, in that, these results constituted critical evidence in mitigation.

Polygraph examination results are generally not admissible at trial in Georgia. Stack v. State, 234 Ga. 19, at 21 (1975), citing Salisbury v. State, 221 Ga. 718 (1966).

The State sought to have this evidence excluded and the trial court ruled it inadmissible. (R. 94; H.T. 43). Petitioner has failed to show that trial counsel's performance in this regard fell below that expected of competent criminal trial counsel. Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674 (1984).

54-55

In paragraphs 54-55, Petitioner alleges that his rights under the Eighth and Fourteenth Amendments to the United States Constitution were violated by introduction of numerous photographs of the victim. Petitioner does not specify which photographs he contends are objectionable. However, under section D of Petitioner's brief, Petitioner refers to State's Exhibits 1, 7, 8, 9, 10, 11, 32, and 33. None of these photographs were objected to at trial or on appeal. Therefore, Petitioner has waived the right to raise this allegation in habeas corpus proceedings. OCGA section 9-14-48; Black v. Hardin, 255 Ga. 239 (1985). The only exceptions to this rule would be for Petitioner



to show 1) cause for failure to object or to pursue on appeal and actual prejudice, or 2) to avoid a miscarriage of justice. (Id.).

As to trial counsel's failure to object to the admission of photographs of the victim, see paragraph 53 (s), supra.

There being no showing of cause and prejudice, nor any showing that the alleged error constituted a miscarriage of justice, this Court finds the same to be precluded from review in habeas corpus proceedings.

56-57

In paragraphs 56-57, Petitioner alleges that his rights under the Eighth and Fourteenth Amendments to the United States Constitution were violated by the use of and presence of armed guards escorting Petitioner and being seated behind Petitioner during the trial proceedings. (T.T. 7-11). Petitioner alleges that this implied to the jury that he was a "very dangerous criminal, ..." and the same denigrated his presumption of innocence.

Although the record does indicate that law enforcement personnel escorted Petitioner into the courtroom and sat several feet away from Petitioner during the trial proceedings, he has failed to show that the security taken was excessive or prejudicial in its appearance to the jury. As the trial court ruled upon Petitioner's request, which apparently was not in the form of a motion, and the issue was not raised on appeal, Petitioner is barred from litigating it before this Court in habeas corpus

proceedings. OCGA section 9-14-48; Black v. Hardin, supra.

This claim presents nothing for the Court to review.

58

In paragraph 58, Petitioner alleges that prosecutorial misconduct deprived him of a fundamentally fair trial at both the guilt-innocence and sentencing phases of his trial. Petitioner also alleges that these actions resulted in convictions and a sentence of death that was imposed under the influence of passion, prejudice and other arbitrary factors. Again, Petitioner fails to specify to which portions of the Prosecutor's actions he is referring. Under section D of Petitioner's Brief in Support of the Petition, Petitioner refers to various actions and arguments made by the Prosecutor, which he alleges violates Donnelly v. DeChristoforo, 416 U.S. 637, at 643, 40 L.Ed.2d 431 (1974).

Petitioner failed to object to these prosecutorial actions at trial, or on direct appeal. Therefore, Petitioner has waived the right to raise and litigate this claim in habeas corpus proceedings. OCGA section 9-14-48; Black v. Hardin, supra.

As to trial counsel's failure to object to the Prosecutor's actions, see paragraph 53 (c), supra.

59-63

In paragraphs 61-62, Petitioner challenges Georgia's arrest law and questions the finding of probable cause by the magistrate who issued a warrant for his arrest, alleging violations of the Fourth and Fourteenth Amendments to the United States Constitution. In paragraphs 59, 60, and 63, Petitioner challenges the



admission of his statements under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution. On direct appeal, the Supreme Court of Georgia reviewed Petitioner's arrest, the Georgia arrest statute, and the admission of Petitioner's statements and found no constitutional errors. Devier, supra, at 609-10 (5), 610-17 (7). Issues which have been litigated, i.e., raised and decided, on direct appeal cannot be reasserted in habeas corpus proceedings. Hammock v. Zant, 243 Ga. 259 (1979).

64-69

In paragraphs 64-69, Petitioner alleges that the Unified Appeal Procedure denies him constitutional rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Petitioner did not object to this procedure at trial nor did he raise the issue on direct appeal. Therefore, Petitioner is precluded from raising this claim now. OCGA section 9-14-48; Black v. Hardin, supra.[1]

70-71

In paragraphs 70-71, Petitioner alleges that the testimony of Linda Gail Elrod was introduced over defense counsel's objection in violation of Petitioner's rights under the Eighth and Fourteenth Amendments to the Constitution of the United States. Petitioner further alleges that the legally required notice that

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1. The Unified Appeal Procedure has been reviewed and upheld in other cases. See Sliger v. State, 248 Ga. 316 (1981); and Welch v. State, 254 Ga. 603 (1985).

this testimony was to be used as an aggravating circumstance was not given, allegedly in violation of OCGA section 17-10-2 and the Eighth and Fourteenth Amendments to the Constitution of the United S ates. On direct appeal, the Supreme Court of Georgia reviewed Petitioner's objections to the testimony of Elrod, and found no statutory or constitutional bar to this testimony and the procedure used for the proof thereof. Devier, supra, at 618-19 (9). The Court specifically stated that "...there is no question that the requisite notice was furnished." Id. Issues decided on direct appeal cannot be reasserted in habeas corpus proceedings. Hammock v. Zant, supra.[2]

72-74

In paragraphs 72-74, Petitioner alleges that he was denied a fair trial by an impartial jury by the trial court's denial of his motion for change of venue, in violation of his rights guaranteed by the Sixth, Eighth and Fourteopth Amendments to the Constitution to the United States and Sections 2-101, 2-111, 2-114, and 2-117 of the Constitution of the State of Georgia, 1983. On direct appeal, the Supreme Court of Georgia reviewed the denial of Petitioner's motion for a change of venue and found no error. Devier, supra, at 608-09 (4). Issues decided on direct appeal will not be considered in habeas corpus proceedings. Hammock v. Zant, supra.

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2. The question of whether adequate notice was given is statutory, not constitutional, and therefore, not cognizable in habeas corpus proceedings.



75

In paragraph 75, Petitioner alleges that his right to a fair trial under the Fifth and Fourteenth Amendments to the Constitution of the United States were violated by the trial court's failure to provide funds for employment of an investigator, psychiatrist and other expert witnesses. Petitioner's trial counsel filed a motion for funds so that they could hire investigators, forensic experts, media experts, and a private psychiatrist. (R. 13-14). The trial court denied these motions. (Motion Transcript, August 23, 1983). However, Petitioner did not raise this claim on appeal. Therefore, Petitioner has waived his right to raise this allegation in habeas corpus proceedings. OCGA section 9-14-48; Black v. Hardin, supra.

As to Petitioner's counsel's actions in this regard, see paragraph 53 (f, 1), supra.

76-77

In paragraphs 76-77, Petitioner alleges that a portion of the sentencing charge to the jury violated his rights secured by the Eighth and Fourteenth Amendments to the Constitution of the United States. (T.T. 1650-51). Petitioner also challenges part of the trial court's charge at the guilt-innocence phase that defined malice, both express and implied. (T.T. 1538; see also Petitioner's brief, pages 60-70). Finally, Petitioner challenges the trial court's charge on venue. (T.T. 1537-38; see also Petitioner's brief, pages 60-70).

Petitioner raised no objection to these charges at trial.

(T.T. 1542, 1662). On direct appeal, Petitioner challenged the sentencing charge now challenged in this petition. (See paragraphs 76-77; T.T. 1650-51). The Supreme Court of Georgia reviewed this charge and found no reversible error. Devier, supra, at 617-18 (8). Issues decided on direct appeal will not be reviewed in habeas corpus proceedings. Hammock v. Zant, supra. Any objections to the other jury charges were not raised on appeal. Therefore, Petitioner is precluded from litigating these claims in habeas corpus proceedings absent a showing of cause and prejudice of which Petitioner has made none. OCGA section 9-14-48; Black v. Hardin, supra.

These allegations present nothing for this Court to review.

78-79

In paragraphs 78-79, Petitioner alleges that he was denied his right to a fair and impartial jury under the Sixth and Fourteenth Amendments to the Constitution of the United States by the exclusion and by peremptory challenge of potential jurors with objections to the imposition of the death penalty. Also, Petitioner alleges that these same actions denied him a jury composed of a representative cross-section of the community. Respondent denies these allegations and contends these claims are waived as Petitioner raised no objection at trial or on direct appeal. The Court agrees. Therefore, these claims present nothing for this Court to review in habeas corpus proceedings. OCGA



section 9-14-48; Black v. Hardin, supra.[3]

WHEREFORE, the Court having found all of Petitioner's allegations to be without merit, waived, or previously decided adversely to Petitioner, the petition is hereby denied.

SO ORDERED, this 30th day of March, 1987.

Hal Craig

HAL CRAIG
JUDGE, SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

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3. "Death-qualified" juries have been found to not violate the requirements of the Sixth Amendment to the Constitution of the United States. Lockhart v. McCree, ___ U.S. ____, 90 L.Ed.2d 137, 106 S.Ct. 1758 (1986).

ORIGINAL

NO. 87-5505



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987



DARRELL GENE DEVIER,

Petitioner,

v.

RALPH KEMP, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

# BRIEF IN OPPOSITION FOR THE RESPONDENT

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## QUESTION PRESENTED

I.

Whether this Court should grant a writ of certiorari to examine the denial of a certificate of probable cause to appeal to the Supreme Court of Georgia where the underlying state court decision found that the allegation raised herein had been previously raised on Petitioner's direct appeal and therefore was precluded from a second review under state procedural guidelines?



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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, Darrell Gene Devier, was convicted in the Superior Court of Floyd County of the murder and rape of Mary Frances Stoner. The Petitioner was sentenced to death for both crimes. On Petitioner's subsequent direct appeal to the Supreme Court of Georgia regarding these convictions and sentences, the judgment and verdict of the Superior Court of Floyd County was affirmed on November 29, 1984. Devier v. State, 253 Ga. 604, 323 S.E.2d 150 (1984). This Court then declined to grant the Petitioner's petition for a writ of certiorari to review this decision by the Supreme Court of Georgia. Devier v. Georgia, ___ U.S. ___, 105 S.Ct. 1877 (1985).

On June 21, 1985, the Petitioner filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia, raising approximately thirteen separate allegations.

After an evidentiary hearing before the state habeas corpus held on February 11, 1986, the petition for state habeas corpus relief was denied on March 30, 1987. On June 18, 1987, the Petitioner's application for a certificate of probable cause to appeal this denial of state habeas corpus relief to the Supreme Court of Georgia was also denied and this petition for a writ of certiorari now follows.

Further facts may be developed herein as necessary for a more thorough illumination of the issues presented to this Court for resolution.



PART TWO

REASON FOR NOT GRANTING THE WRIT

I. NO FEDERAL CONSTITUTIONAL ISSUE IS PRESENTED FOR REVIEW IN THIS PETITION FOR A WRIT OF CERTIORARI.

The Petitioner here is attempting to challenge the denial of habeas corpus relief in this case based solely upon an issue which was previously raised on the Petitioner's direct appeal. Respondent submits that under Georgia procedural rules, such previously decided issues cannot be reconsidered by the lower state habeas corpus court and this principle of state law was the basis of the state habeas corpus court's decision on this point. As such, this application of an adequate and independent state law ground for the denial of habeas corpus relief demonstrates that there is no federal constitutional issue presented in this petition for a writ of certiorari. Berea College v. Kentucky, 211 U.S. 45, 53 (1908); Fox Film Corp. v. Muller, 296 U.S. 207 (1935).

In paragraphs 70-71 of the original habeas corpus petition, the Petitioner alleged a violation of his Eighth and Fourteenth Amendment Rights by the introduction at the sentencing phase of his trial of testimony of a woman that Petitioner had previously raped. The Supreme Court of Georgia on direct appeal summarized the facts as following:

> Ms. Elrod testified that on June 2, 1979, she had been raped by Devier. She explained that she had known him for many years; that Devier had even lived in her home for a period of time. On the day in question, she and Devier had left her house in his car to go smoke some marijuana. They got into an argument and he asked her if he did not owe her "some licks from yesterday." She testified that he grabbed her, threw her into the back seat, and made her undress. Then, she testified, that they had "sexual intercourse" without her consent.

Devier v. State, 253 Ga. 604, 618(9), 323 S.E.2d 150 (1984). Petitioner challenged the admissibility of this evidence at the sentencing phase, but the Supreme Court of Georgia rejected this challenge noting that:

> On the issue of sentence, however, "the trier of fact must make a determination as to the sentence to be imposed, taking into consideration all aspects of the crime, the past criminal record or lack thereof, and the defendant's general moral character. [Cits.] Any lawful evidence which tends to show the motive of the defendant, his lack of remorse, his general moral character, and his pre-disposition to commit other crimes is admissible in aggravation, subject to the notice provisions of the statute." (Citations omitted).

Id. at 618-19. The Supreme Court of Georgia then found that no statutory or constitutional bar to the introduction of this evidence. Id. at 619.

The state habeas corpus court when faced with this same issue raised in the state habeas corpus petition regarding Ms. Elrod's testimony did not reach any of the merits of the Petitioner's claims of constitutional infirmity in the introduction of this evidence. (See state habeas corpus court order, pp. 17-18). Instead, after noting that the Supreme Court of Georgia had addressed this issue on direct appeal, the state habeas corpus court concluded:

> Issues decided on direct appeal cannot be re-asserted in habeas corpus proceedings. Hammock v. Zant, [243 Ga. 259, 253 S.E.2d 727 (1979)].



Id. at 18. As such, it is clear that the state habeas corpus court based this determination of the Petitioner's allegations solely upon an interpretation of Georgia law, not of any federal constitutional principle.

The principle that a state habeas corpus court is precluded from reviewing issues previously raised on direct appeal is a well-settled principle of Georgia law. See Elrod v. Ault, 231 Ga. 750, 204 S.E.2d 176 (1974); Brown v. Ricketts, 233 Ga. 809, 810-11(1), 213 S.E.2d 672 (1975); Gunter v. Hickman, 256 Ga. 315, 316(1), 348 S.E.2d 644 (1986). As the Supreme Court of Georgia noted in Brown v. Ricketts, supra at 811, a writ of habeas corpus is not a means for a second appeal under Georgia law and after review by an appellate court, the same issues cannot be reviewed in habeas corpus. The appellate courts exist to review appeals and it is not the function of state habeas corpus courts to review issues already decided by an appellate court and it is not the function of the appellate court to review, on the denial of the writ of habeas corpus, issues previously decided on direct appeal. Id. The Supreme Court of Georgia also noted in Brown:

> One review on the merits, whether on habeas corpus or on appeal of conviction, is sufficient, where neither facts nor law has changed.

Id.

As the Petitioner in the instant case demonstrated no such change in either the law or the facts to the state habeas corpus court in its review of the issue of Ms. Elrod's testimony, the state habeas corpus court was bound by the state procedural guideline not to review this issue previously raised on direct appeal. This decision involved no application of federal constitutional principles.

## CONCLUSION

Therefore, this Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia, as it is manifest that there is no federal question for review by this Court as to Petitioner's claim.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, DENNIS R. DUNN, a member of the Bar of the Supreme Court of the United States and counsel of record for the Respondent, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition upon counsel for the Petitioner by depositing a copy of the same in the United States mail with proper address and adequate postage to:

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This 16th day of October, 1987.

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# SUPREME COURT OF THE UNITED STATES

DARRELL GENE DEVIER *v.* RALPH KEMP, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 87–5505. Decided November 9, 1987

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231–241 (1976) (MARSHALL, J., dissenting), I would grant the petition for writ of certiorari. Yet even if I did not hold this view, I would grant the petition to resolve the question whether, or under what circumstances, evidence of crimes for which the defendant has not been tried or convicted may be introduced at the sentencing phase of a capital trial. As I recently argued in *Williams* v. *Lynaugh*, 484 U. S. —— (MARSHALL, J., dissenting from denial of certiorari), the admission of evidence of unadjudicated crimes at the sentencing phase impinges on the unique constitutional concern for reliability in capital trials. The question whether the state may introduce such evidence without violating the Eighth and Fourteenth Amendments has also prompted a number of conflicting decisions nationwide. Compare *State* v. *Bobo*, 727 S. W. 2d 945, 952–953 (Tenn.) (unadjudicated-crimes evidence not admissible), cert. denied 484 U. S. —— (1987) and *State* v. *Bartholomew*, 101 Wash. 2d 631, 640–642, 683 P. 2d 1079, 1085–1086 (1984) (en banc) (same) with *Milton* v. *State*, 599 S. W. 2d 824, 827 (Tex. Crim. App. 1980) (en banc) (unadjudicated-crimes evidence admissible). This case again demonstrates that the Court should resolve this important question.

Petitioner Darrell Gene Devier was convicted of rape and murder and sentenced to death. At the sentencing phase of

petitioner's trial, the state, over defense counsel's objection, introduced the testimony of Linda Elrod. Ms. Elrod, a minor, testified that she had been raped by petitioner some six months before the crime for which petitioner was on trial. Petitioner had never been tried for the alleged rape of Ms. Elrod. Moreover, the trial court did not instruct the jury that it had to find, by any particular standard of proof, that petitioner had raped Ms. Elrod before it could consider the evidence in determining petitioner's sentence. In short, the jury was presented with unproved but highly prejudicial allegations of criminal conduct, and was given no guidance on how to consider these allegations in determining whether death was an appropriate punishment. As in *Williams*, I maintain serious doubts whether the introduction of such evidence can be reconciled with the heightened need for reliability in death sentencing proceedings. I would therefore grant the petition for certiorari.